Supreme Court No. 97452-7

SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Personal Restraint Petition of

DON WESLEY WINTON

Petitioner.

MEMORANDUM OF AMICUS CURIAE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS

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I. Introduction

Mr. Winton is one of approximately 18,000 persons in communities across the State of Washington that the Department of Corrections (DOC) actively supervises.[1] This supervision includes a standardized policy for regulating travel by offenders while they are in the community. DOC 380.650 (attached as Appendix A). Although low risk offenders who are not required to register are not obliged to get permission to travel in-state, all other offenders must obtain DOC approval to travel outside of their county of residence. Id. The policy requires the Community Corrections Officer (CCO) verify the offender's travel plans and notify the DOC office nearest the offender's destination unless the travel is ongoing, e.g. travel for employment, education, treatment, etc. Id.

This Court has already acknowledged that the "freedom to travel throughout the United States has long been recognized as a basic right under the United States Constitution." State v. Lee, 135 Wn.2d 369, 389, 957 P.2d 741 (1998).[2] The fundamental nature of this freedom can be seen in the variety of sources in which it is found, from the Magna Carta

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[1] See Washington State Department of Corrections, Supervision in the Community, available at https://www.doc.wa.gov/corrections/community/supervision.htm (last accessed April 4, 2020).

[2] The Constitution did not include a specifically enumerated a right to travel, but the Articles of Confederation provided in article 4 that "the people of each State shall have free ingress and regress to and from any other State." Boudin, The Constitutional Right to Travel, 56 Col.L.Rev. 47 (1956).

to the Universal Declaration of Human Rights. See Eggert v. City of Seattle, 81 Wn.2d 840, 841, 505 P.2d 801 (1973).

The Court should provide clear guidance for DOC and ISRB when imposing travel restrictions regarding the need that they be narrowly tailored to achieve the legitimate state interest promoting community safety without excluding large areas of the state which thereby quickly turn into unconstitutional banishment orders.[3] The enormous range of the various ISRB and DOC orders barring Mr. Winton from entire cities and counties around the state illustrate the need for this Court to clarify the limits of DOC's authority where it impinges upon this fundamental constitutional right. In the case of geographic limitations, the Court should identify specific factors for DOC and ISRB to take into consideration when crafting these conditions. It is especially important that DOC and ISRB receive clear guidance in this regard because there is no effective mechanism for an offender to obtain timely judicial review of a decision that impermissibly infringes upon this right. Furthermore, these aggrieved

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[3] **Banishment** – *noun* -
the punishment of being sent away from a country or other place.
"Adam and Eve's **banishment from** the Garden of Eden"
Banish - *transitive verb* -
1: to require by authority to leave a country
a dictator who *banishes* anyone who opposes him
2: to drive out or remove from a home or place of usual resort or continuance
He was *banished* from court.
banishing her from the sport
The reporters were *banished* to another room.
Available at: https://www.merriam-webster.com/dictionary/banish

offenders are not entitled to counsel to challenge these overreaching conditions. These limitations amount to a wide grant of unchecked discretion to DOC and ISRB in fashioning conditions of supervision that are being used to unconstitutionally infringe on the right to travel.

We urge the Court to endorse the four-factor Schimelpfenig[4] test to determine the appropriateness of geographical boundaries and exclusions and direct DOC and ISRB to address those factors when imposing these conditions during supervision. Doing so will provide some additional measure of protection of these recognized liberty interests for parolees or offenders who are otherwise unlikely to be able to obtain meaningful or timely review of improper banishment orders.

These conditions have real-life consequences for parolees. These limitations impact employment, the ability to visit a loved one, travel to see an attorney, and many other activities. Waiting years for courts to decide personal restraint petitions—exactly the case here—means that a parolee may lose a job, or not be able to visit an ailing relative who passes away.

It is important that DOC and ISRB get these decisions right the first time. Subjecting restrictions that limit the exercise of a fundamental right to strict scrutiny and clearly articulating the factors to be considered

[4] State v. Schimelpfenig, 128 Wn.App. 224, 115 P.3d 338 (2005).

in those decisions is not only constitutionally required, it vastly increases the likelihood that the correct decision will be made in the first place.

II. INTEREST OF AMICUS

The interest of Amicus is set forth in the motion to permit the filing of this brief and is incorporated by reference.

III. STATEMENT OF THE CASE

Amicus adopts Petitioner's Statement of the Case.

IV. ARGUMENT

A. Unreasonable DOC restrictions on the right to travel are properly analyzed as banishment orders—which are strongly disfavored.

Unreasonable geographic restrictions that prohibit parolees from traveling within large areas amount to banishment orders. In colonial times, "[t]he most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one." Smith v. Doe, 538 U.S. 84, 98, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (citing T. Blomberg & K. Lucken, American Penology: A History of Control 30-31 (2000)). Since then, society has grown and come to the collective conclusion that restricting a convicted individual's movements to a neighboring city, county, or state raises substantial public policy concerns for everyone. See e.g. McCreary v. State, 582 So.2d 425, 427-28 (Miss. 1991); Predick v. O'Connor, 260 Wis.2d 323, 325, 660 N.W.2d 1 (Wis.Ct.App. 2003). Although Mr.

Winton's condition is written to limit his travel within a specific prescribed geographical boundary, it effectively banishes him from traveling into other areas unless his CCO or the ISRB—non-judicial officers—decide otherwise.

In banishment cases, the facts always involve some party, be it the court or an agency, ordering that an individual is excluded from entering a specific location—precisely the situation here. For example, in Sims, the trial court banished the defendant from residing in or entering Cowlitz County, other than to travel from a location outside the county to a destination outside the county. This condition was determined to be an unconstitutional encroachment on the defendant's right to travel because it was not narrowly tailored to any compelling governmental interest. State v. Sims, 152 Wn.App. 526, 530-33, 216 P.3d 470 (2009), aff'd, 171 Wn.2d 436, 256 P.3d 285 (2011); see also State v. Gitchel, 5 Wn.App. 93, 94-95, 486 P.2d 328 (1971) (holding "unhesitatingly" that a sentencing condition banishing the defendant from the state forever would be unconstitutional); In re Pers. Restraint of Matteson, 142 Wn.2d 298, 311, 12 P.3d 585 (2000) (approving of Gitchel as " quite proper[ ]").

Orders which exclude an offender from a wide swath of territory without a meaningful relationship to the perceived threat, have been rejected by a number of courts. An order banishing an individual from a large geographical area is bound to raise both societal and legal concerns.

Banishment orders unreasonably encroach on the liberty interests which offenders in the community retain to travel within a state. See State v. Franklin, 604 N.W.2d 79, 83-84 (Minn.2000); State v. Muhammad, 309 Mont. 1, 8, 43 P.3d 318 (2002). Because of its constitutional implications, strict scrutiny is the appropriate standard for reviewing these banishment orders. Shapiro v. Thompson, 394 U.S. 618, 630-31, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). To survive such review, the order must be narrowly tailored to serve a compelling governmental interest. Id. at 634; Schimelpfenig, 128 Wn.App. at 226.

Consistent with this line of authority, the Washington Court of Appeals found county-wide banishment orders unconstitutional in the absence of some factual basis for assuming that there exists an ongoing threat to victims or witnesses. In re Pers. Restraint of Martinez, 2 Wn.App. 2d 904, 909, 413 P.3d 1043 (2018). The court struck down a condition imposed by the ISRB prohibiting the defendant from entry into Thurston County without prior written approval from his CCO and the ISRB, based on the residence of the victim. Id. at 916. Martinez asserted that the victim had subsequently moved to Texas and therefore the concern no longer justified the order. Id. at 915. Division Two held that such a ban on entry into Thurston County was akin to a banishment order and unconstitutional because Martinez had no readily available means to

modify the condition even if the basis for the prohibition no longer existed. Id. at 913, 916.

This strong disapproval of banishment orders is a consistent theme among multiple jurisdictions. The Minnesota Supreme Court for example, found an order banishing the defendant from Minneapolis was impermissible because the defendant had substantial ties to the city and the order was not related to his crime of trespassing into a building located on the outskirts of the city. State v. Franklin, 604 N.W.2d 79, 83-84 (Minn. 2000). That Court observed "Although probationers, by virtue of their convictions, are subject to greater restrictions of their constitutional rights than are ordinary citizens, a district court's discretion in establishing probation conditions is 'reviewed carefully' when a condition restricts fundamental rights." Id. at 82. As a result, geographical limitations may be imposed as a probation condition, but the condition must be reasonably related to the purposes of probation. Id. (citing ABA Standards for Criminal Justice 18-2.3(f) (1980)).

> In determining whether the geographical exclusion was reasonably related to probation purpose, ...we would consider the following factors: 1) the purpose sought to be served by probation, 2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers, and 3) the legitimate needs of law enforcement.

Id. at 83. Where there is a geographic limitation is consistent with the purposes of probation, "it must not be unduly restrictive of the

probationer's liberty or autonomy," and is therefore "reviewed carefully." Id.

The Montana Supreme Court conducted its own survey and observed that "[a] majority of the jurisdictions examining the issue have held that a probation condition banishing a defendant from a geographic area, such as a state or a county, is typically broader than necessary to accomplish the goals of rehabilitation and the protection of society...." State v. Muhammad, 309 Mont. 1, 8, 43 P.3d 318 (2002). The Montana Supreme Court concluded that the banishment condition excluding a probationer or parolee from the entire county where he lived and committed the underlying offense was not reasonably related to the goals of rehabilitation and was far broader than necessary to protect the victim. 309 Mont. at 9-10 (emphasis added).

A California court vacated an order banishing the defendant from the community because it would have displaced the defendant from her home of 24 years and was more likely to impede rehabilitation than to promote it. People v. Beach, 147 Cal.App.3d 612, 620-23, 195 Cal.Rptr. 381 (Cal.Ct.App.1983). In Texas, an appellate court found a county-wide ban for a defendant convicted of unauthorized use of a motor vehicle was inappropriate because it was not sufficiently related to his rehabilitation and would leave him broke and unemployed. Johnson v. State, 672 S.W.2d 621, 623 (Tex.App.1984).

In Alaska, a reviewing court found a probation condition prohibiting the defendant, who had been convicted of driving a snow machine while intoxicated, from entering a village where he resided and was self-employed as a commercial fisherman, was improper because it was not related to the nature of the offense, was unnecessarily severe and restrictive, and did not appear to be reasonably related to the defendant's rehabilitation. Edison v. State, 709 P.2d 510 (Alaska Ct.App.1985). In Oregon, the appellate court found that a probation condition restricting the defendant from the county where the victim lives was broader than necessary. State v. Ferre, 84 Or.App. 459, 734 P.2d 888 (1987).

B. Sentencing conditions that exclude travel to a particular large geographical area are subject to strict scrutiny in order to ensure that they are "reasonably necessary," are no broader than necessary, and do not amount to banishment orders.

Where sentencing provisions interfere with important liberty interests, this Court has consistently held that it would "more carefully review conditions that interfere with a fundamental constitutional right..." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) ("fundamental right to the care, custody, and companionship of one's children"). Such conditions must be "sensitively imposed" and "reasonably necessary to accomplish the essential needs of the State and public order." Id. at 374 (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (right to marriage)) "More careful review of sentencing

conditions is required where those conditions interfere with a fundamental constitutional right... Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. Warren, 165 Wn.2d at 32 (emphasis added). Additionally, conditions that interfere with fundamental rights must be "sensitively imposed." State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (citing United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir.1975)).[5]

Where the fundamental right to movement is being infringed, a showing of a compelling state interest is necessary to justify the infringement. Shapiro v. Thompson, 394 U.S. 618, 627, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (applying an Equal Protection analysis); Dunn v. Blumstein, 405 U.S. 330, 335-60, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (the right to travel as a fundamental right protected by the Equal Protection clause of the Fourteenth Amendment); Eggert v. City of Seattle, 81 Wn.2d at 843-845 (right to equal protection of the law violated by burdensome residency requirement).

Sentencing conditions which serve to banish offenders from an entire city or county are similarly subject to strict scrutiny to ensure the

[5] See also State v. Ancira, 107 Wn.App. 650, 27 P.3d 1246 (2001), holding that an order prohibiting all contact between the defendant and his children, where he was convicted only of domestic violence against his wife, violated Ancira's fundamental right to parent his children because cutting off all contact was not reasonably necessary to protect them from the harm of witnessing domestic violence.

order has been narrowly tailored to serve a compelling governmental interest. State v. Schimelpfenig, 128 Wn.App. 224, 226, 115 P.3d 338 (2005).[6] DOC and ISRB conditions that impinge upon the fundamental right to travel should be subject to the same careful review.

Additionally, unlike with a sentencing condition, no judicial officer conducts a strict scrutiny analysis at the time of imposition of the sentencing condition. Because the first opportunity for judicial review of a DOC or ISRB supervision condition comes at the appellate level, appellate courts should apply strict scrutiny in the *de novo* review of any specific condition that impinges on a fundamental constitutional right. See e.g. Amunrud v. Bd. Of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006) (review of constitutional questions is *de novo*).[7]

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[6] Schimelpfenig appealed a banishment order imposed following his conviction for first degree murder prohibiting him from residing in Grays Harbor County for the remainder of his life to protect the mental well-being of the murdered victim's family, but the appellate court vacated the order because it is not sufficiently tailored and therefore impermissibly infringed on Schimelpfenig's right to travel.

[7] An individual seeking the procedural protections of the Fourteenth Amendment's due process clause must establish that his or her interest in life, liberty, or property is at stake. Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). "A liberty interest may arise from the Constitution," from "guarantees implicit in the word 'liberty,'" or "from an expectation or interest created by state laws or policies." Wilkinson, 545 U.S. at 221. Where an individual establishes a liberty interest, due process protections apply. See Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). If protected interests are implicated, courts then must decide if the procedures employed constituted due process of law. Morrissey, 408 U.S. at 481.

C. **Adopting the *Schimelpfenig* test for reviewing of a geographical restriction will avoid turning these restrictions into banishment orders.**

This case specifically concerns conditions that infringe upon the fundamental right to travel. Endorsing the analytical framework outlined in Schimelpfenig provides the clear standards necessary to ensure that a geographical restriction order does not turn into a banishment order.

The Court of Appeals in Schimelpfenig set out a nonexclusive set of five factors to consider in determining whether a geographic restriction infringes on a defendant's right to travel including:

> (1) whether the restriction is related to protecting the safety of the victim or witness of the underlying offense;
> (2) whether the restriction is punitive and unrelated to rehabilitation;
> (3) whether the restriction is unduly severe and restrictive because the defendant resides or is employed in the area from which he is banished;
> (4) whether the defendant may petition the court to temporarily lift the restriction if necessary; and
> (5) whether less restrictive means are available to satisfy the State's compelling interest.

128 Wn.App. at 229. Consideration of these factors ensures that the use of a geographical restriction will always turn on a careful analysis of the facts, circumstances, and total atmosphere of the case. Id.

Here there was no meaningful nexus between the various geographic exclusions and victim safety or recidivism given Mr. Winton's compliance with the no contact orders during supervision. For example, in Halsted v. Sallee, 31 Wn.App. 193, 639 P.2d 877 (1982), Division Three

addressed a restraining order, intended to protect children from their mentally unstable father, which required the father not to travel north of a central Washington town. The court concluded that although the State had a compelling interest in protecting the children, the ban was not sufficiently tailored because an order enjoining communication or contact could serve the same purpose. Id. at 197. Banning defendants from an entire city or county requires the defendant's behavior present a meaningful ongoing threat to victims or witnesses.

D. A review of case law shows that a requirement that a restriction on the right to travel be narrowly tailored is not a burdensome one.

There are multiple cases, in this state and others, in which courts have successfully crafted narrowly tailored restrictions on the right to travel when there is a compelling governmental interest in regulating it:

In State v. McBride, 74 Wn.App. 460, 873 P.2d 589 (1994), Division Three upheld a statute permitting a court to ban individuals convicted of drug trafficking from the areas where they had trafficked drugs if such areas had a proven pattern of drug trafficking activity. The court there found it key that the statute had crime prevention and rehabilitative aims. McBride, 74 Wn.App. at 465-67.

In Larson v. State, 572 So.2d 1368 (Fla.1991), the trial court banished the defendant from Tallahassee for five years after he moved to that city for the sole purpose of tampering with a witness. The Florida

Supreme Court upheld the order because Larson had not shown a legitimate need to visit Tallahassee and the banishment order could be amended if such a need arose. Id. at 1371-72.

In People v. Brockelman, 933 P.2d 1315 (Colo.1997), the Colorado Supreme Court upheld a defendant's two-year banishment from two neighboring cities after the defendant brutally assaulted his girlfriend and violated criminal and civil restraining orders. The court concluded that the banishment was appropriate because the girlfriend lived and worked in the area and the evidence presented at trial raised serious concerns about her continuing safety. Id. at 1317.

In State v. Nienhardt, 196 Wis.2d 161, 537 N.W.2d 123 (Wis.Ct.App.1995), the defendant was banned from a city after she had been convicted of repeatedly stalking and harassing an individual who lived in the city. The appellate court upheld the ban, noting that the defendant did not reside in the city or have a reason to visit it and the ban was essentially a demonstrably necessary for the protection of the victim's safety. Id. at 168-70.

Finally, in Oyoghok v. Municipality of Anchorage, 641 P.2d 1267 (Alaska Ct.App. 1982), the court affirmed a condition that restricted the defendant, convicted of soliciting for prostitution, from being within a two block radius area where street prostitution occurs.

In each of these cases, the courts were able to articulate specific facts unique to the case at hand to conclude that a restriction on the right to travel was warranted, and tailored those restrictions to fit the specific government interest. Here, a geographical restriction could be imposed if the parolee lived near the victim and there was evidence that the defendant and victim came into regular inadvertent contact with each other or if the parolee intentionally violated the no contact order. Without specific, articulable facts to support the imposition of a restriction on travel, this right should not be limited.

E. The lack of a readily-available means to seek review of an adverse decision gives rise to the need for the initial decision-maker closely scrutinize any restrictions on the right to travel.

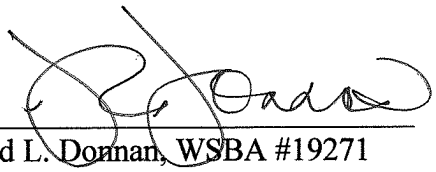
Given the lack of an effective means of obtaining timely review of an adverse decision, it is imperative on the ISRB and individual community corrections officers, appreciate the need to carefully review and clearly articulate the compelling need which requires limitations on the offender's right to travel. See Franklin, 604 N.W.2d at 84 (they "must establish a record that is capable of being 'reviewed carefully' by an appellate court"). With the exact nature of those needs in mind, the ISRB or CCO must then "sensitively impose" restrictions on travel as narrowly possible to protect those interests without unduly burdening the fundamental freedom of movement.

It is particularly burdensome to repeatedly submit trip permit requests. Individuals who travel out-of-state, or who work in one county and reside in another often have to repeatedly submit trip permit requests. Should the ISRB or a CCO deny the request, the parolee must file a PRP to challenge the decision, as was the case here. The parolee may not receive a decision from the court for years, and in the meantime, has no recourse if the parolee's fundamental right to travel is being violated.

V. CONCLUSION

Although the ISRB and DOC have the authority to require an offender to remain outside a geographic boundary, such authority is subject to constitutional limitations. This Court should hold that banishment orders are a significant burden on an offender's right to travel and association which must be narrowly tailored. The various orders in Mr. Winton's case were far broader than necessary to accomplish the goals of rehabilitation and the protection of society, and were therefore, unconstitutional.

Respectfully submitted this 9th day of April, 2020.



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1) The Assignment Coordinator will assign the contact as an "other" investigation code in the offender's electronic file for completion within 7 days.

2) The CCO from the receiving county may make Field visits to the approved destination address.

3) The CCO will instruct the offender to report to the office nearest the destination address via KIOSK/CeField and/or the Duty Officer within one business day of arrival.

4. Emergency travel may be authorized if approved by the Community Corrections Supervisors/designees of both the sending and the receiving offices.

5. Report information will be added to the offender's electronic file.

III. Out-of-State Travel

A. For Interstate Compact offenders and offenders traveling as part of a request to transfer supervision, travel requests will be handled per DOC 380.605 Interstate Compact.

B. For all other offenders, CCOs are authorized to allow temporary out-of-state travel for up to 31 days by issuing DOC 05-546 Out-of-State Travel Permit.

C. The CCO will enter the information in the offender's electronic file.

DEFINITIONS:

Words/terms appearing in this policy may be defined in the glossary section of the Policy Manual.

ATTACHMENTS:

None

DOC FORMS:

DOC 01-085 In-State Travel Permit
DOC 05-546 Out-of-State Travel Permit

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS	APPLICABILITY **FIELD**		
	REVISION DATE 1/9/18	PAGE NUMBER 2 of 3	NUMBER **DOC 380.650**
POLICY	TITLE **TRAVEL FOR COMMUNITY OFFENDERS**		

REFERENCES:

DOC 100.100 is hereby incorporated into this policy; RCW 9A.44.130; DOC 310.010 Assignments; DOC 380.605 Interstate Compact; DOC 390.600 Imposed Conditions

POLICY:

I. The Department has established guidelines for offender travel to monitor offender movement in the community.

DIRECTIVE:

I. General Requirements

A. If the offender is under the jurisdiction of the Indeterminate Sentence Review Board (Board) and has a geographic boundary condition imposed by the Board, travel requires prior Board approval.

B. If an offender has a Victim Wraparound or Community Concerns flag in his/her electronic file, the Community Corrections Officer (CCO) must review the Victim Safety Plan and confirm that the travel will not compromise the plan. Information on the plan is available through the Community Victim Liaison.

C. Travel is prohibited outside of the 50 states or the District of Columbia.

II. In-State Travel

A. Low Risk offenders not required to register do not require permission to travel in-state.

B. All other offenders must have permission via DOC 01-085 In-State Travel Permit before traveling outside their county of residence.

1. Ongoing travel (e.g., travel for employment, education, treatment) may be granted.

2. The supervising CCO will verify the offender's travel plans.

3. Before allowing overnight travel, the CCO will notify the office nearest the offender's destination unless it is ongoing travel.

a. For Level 3 sex offenders requesting to stay over 24 hours, the CCO will request that the destination address be investigated by contacting the appropriate Assignment Coordinator.

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

POLICY

APPLICABILITY		
FIELD		
REVISION DATE	**PAGE NUMBER**	**NUMBER**
1/9/18	1 of 3	**DOC 380.650**
TITLE		
TRAVEL FOR COMMUNITY OFFENDERS		

REVIEW/REVISION HISTORY:

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Revised: 4/6/15
Revised: 1/9/18

SUMMARY OF REVISION/REVIEW:

I.A., II.B.3.a. - Adjusted language for clarification
II.B.3.a.1) - Adjusted investigation timeframe to 7 days
II.B.3.a.3) - Added CeField reference

APPROVED:

Signature on file

STEPHEN SINCLAIR, Secretary
Department of Corrections

12/27/17
Date Signed

MERYHEW LAW GROUP

April 09, 2020 - 1:00 PM

Transmittal Information

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